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Please respond to the Portsmouth office

January 11, 2018

Via Overnight Mail

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Re: David Hodges, Jr., Barry Sanborn & Patricia Sanborn Hodges
v. Alan Johnson, Trustee, William Saturley, Trustee, and
Joseph McDonald; Docket No. 2016-0130

Dear Clerk Fox:

I am enclosing an original and seven (7) copies of Motion for Permission to File a Reply to Objection to Motion for Reconsideration or Rehearing.

Thank you for your cooperation.

Very truly yours,

Russell F. Hilliard
rhilliard@uptonhatfield.com

RFH/sem
Enclosure
cc: Roy W. Tilsley, Esq. (w/ enclosure)(via Electronic and U.S. Mail)
Edward J. Sackman, Esq. (w/ enclosure)(via Electronic and U.S. Mail)
Jeffrey H. Karlin, Esq. (w/ enclosure)(via Electronic and U.S. Mail)
Alan Johnson (w/ enclosure)(via Electronic and U.S. Mail)
William Saturley, Esq. (w/ enclosure)(via Electronic and U.S. Mail)

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2016-0130

David Hodges, Jr., Barry Sanborn, and Patricia Sanborn Hodges

v.

Alan Johnson and William Saturley, Trustees, and Joseph McDonald

MOTION FOR PERMISSION TO FILE A REPLY TO OBJECTION TO MOTION FOR RECONSIDERATION OR REHEARING

The Respondents in the above matter hereby move, pursuant to Rule 21(3-A), for permission to file a Reply to the Petitioners' Objection to the Respondents' Motion for Reconsideration or Rehearing, on the following grounds:

1. The Petitioners' objection asserts that the Respondents should have objected to the three Justice panel prior to oral argument, and otherwise disputes the Respondents' identification of the points of law and fact that Respondents submit were overlooked or misapprehended.

2. The Respondents wish to have an opportunity to address these arguments, as they raise new issues as to whether reconsideration or rehearing is justified or warranted, and also, to some extent, misconstrue or misstate the Respondents' positions.

3. Given the undisputed fact that the two Justice majority and the dissent unanimously agree that the trial court erred, and the absence of any discussion of the duty of impartiality in the parties' briefs and argument, permission to submit a Reply should be afforded the Respondents.[1]

---

[1] This assertion is based upon a review of the recording of the oral argument.

4. The proposed Reply is attached to this motion.

5. Counsel for the Petitioners does not assent to this Motion.

Respectfully submitted,

Alan Johnson and William Saturley,

By their attorneys,

UPTON & HATFIELD, LLP

Date: January 11, 2018

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Joseph McDonald,

By his Attorneys,

WADLEIGH, STARR & PETERS, PLLC,

Date: January 11, 2018

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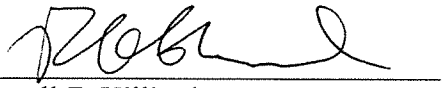
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded to Roy W. Tilsley, Jr., Esq. and Edward J. Sackman, Esq.



Russell F. Hilliard

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2016-0130

David Hodges, Jr., Barry Sanborn, and Patricia Sanborn Hodges

v.

Alan Johnson and William Saturley, Trustees, and Joseph McDonald

RESPONDENTS' REPLY TO OBJECTION TO MOTION FOR RECONSIDERATION OR REHEARING

The Respondents in the above matter hereby reply to Petitioners' Objection to their Motion for Reconsideration or Rehearing as follows:

1. Contrary to the arguments raised in the Petitioners' Objection, the Respondents have never questioned the authority of the Court to proceed with a reduced panel, or of a two-justice majority to issue a legally binding decision. Had the three-justice panel's decision been unanimous, the Respondents would not have questioned the propriety of the decision on grounds that a full Court should decide the case.

2. But in fact only two of the three justices on the panel who heard the case agreed that the trial court's decision should be affirmed. The dissenting opinion provided cogent reasons why the trial court's decision should not be affirmed. Further, all three sitting justices agreed that the trial court set aside the decanting on erroneous grounds, and the parties did not address in their briefs the basis for the majority's decision that the Respondents breached their duties of impartiality.

3. In fact, the duty of impartiality was not once mentioned during the parties' oral arguments. None of the three justices questioned the parties' counsel about the duty, or whether

it could be eliminated or altered by the governing 2004 Trust Agreements. Neither the Court nor the parties' counsel discussed the duty as an alternative basis to affirm the trial court's decision. The determination by the two-justice majority that the trial court and parties actually intended to refer to the duty of impartiality was not expressed by any justice during the oral argument, denying the Respondents' counsel any opportunity to rebut the basis for that outcome-determinative conclusion.

4. Further, and contrary to the position of the Petitioners, there is no indication that the Court disposed of the issue whether the terms of the governing 2004 Trust Agreements relieved the Respondents from the duty of impartiality. The Petitioners may disagree with the Respondents' position on this issue. But it cannot be denied that the issue was neither briefed by the parties nor mentioned in the majority's decision. It was, however, thoroughly addressed by the parties before the trial court. Despite explicitly discussing the duty of impartiality in its decision and questioning the Respondents' expert about it at trial, the trial court did not find a breach of that duty.

5. Under these unusual circumstances, it is not unreasonable to grant the Respondents an opportunity to be heard on the issue, rather than to assume that both the trial court and the parties on appeal intended to address the Respondents' duty of impartiality when they explicitly referred to the duty to consider the interests of the beneficiaries. The Court's decision on the parameters of a trustee's duty of impartiality will significantly impact the administration of trusts in New Hampshire, and decisions by settlors whether to establish trusts in New Hampshire. Accordingly, it is not unreasonable to request that the full Court carefully consider the important issues of first impression that are raised in this appeal but were not fully examined, with the assistance of briefs and arguments from the parties.

6. In addition, the Petitioners continue to mischaracterize the Respondents' position by inaccurately claiming that the Respondents argue that "the trustees did not owe them a duty, as their interest was a mere expectancy." Objection, ¶ 5. To the contrary, while the Respondents have freely and repeatedly acknowledged that they owed duties to the Petitioners under RSA 564-B:8-801 to "administer, invest and manage the [T]rusts and distribute the [T]rust[s'] property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter," the Respondents contend that RSA 564-B:8-814(b) (unique to New Hampshire) mitigates that duty by establishing that the Petitioners' interests "...are neither ...property interest[s] nor...enforceable right[s], but...mere expectanc[ies]".

7. The Respondents' exercise of their broad discretions to decant must be evaluated in the context of the provisions of the New Hampshire Trust Code and the express provisions of the 2004 Trust Agreements which supplement the Code. Neither the trial court nor the Court address the effect of the applicable statutory and Trust Agreement provisions on the Respondents' extended powers to decant in a manner that eliminates or dilutes the Petitioners' interests, the exercise of which could never be in the Petitioners' financial interests, but which is nevertheless expressly permitted by the language of the Trust Agreements and the New Hampshire decanting statute.

8. In this regard, Attorney McDonald's testimony that he did not consider the Petitioners' "financial interests" has been unreasonably distorted by the Petitioners and was misconstrued by the Court. The context in which that testimony occurred demonstrates that Attorney McDonald was referring to the well-settled principles of trust law that the extent of a trustee's duty to inquire into the beneficiary's resources before exercising a discretion over trust

distributions depends on whether: (i) the trustee's discretion is limited or extended, and (ii) whether such a duty of inquiry might be expressly imposed or negated by any given trust agreement. *See* Transcript at 118-32. In this case the terms of the governing 2004 Trust Agreements expressly negate any obligation or duty that might otherwise exist on the part of the Respondents to consider the Petitioners' other resources (*i.e.*, their personal financial situations) (Respondents as Trustees "...may take into consideration other financial resources of the beneficiaries...but [are] not required to do so," *see* App. 137, 185). These basic principles of the common law of trusts have been completely ignored in the trial court's and the majority's analyses.

9. The majority and the Petitioners also ignore Trustee Saturley's testimony at trial that he was aware of the economic impact of the decision on the Petitioners, and therefore "considered it." *See* Transcript at 309-22, attached hereto as Exhibit A. He testified that he nevertheless allowed the decantings to go forward because of his good faith consideration of the Petitioners' deleterious impact on the business and other beneficiaries, and how that behavior violated the settlor's material purpose in creating the Trusts. *Id.* While the trial court may have disagreed with the Respondents' decisions and favored further consideration of other alternatives, the evidence shows, beyond any reasonable dispute, that the Respondents acted in good faith and in a manner that they considered to be consistent with their duties, within bounds of their authority, and consistent with the settlor's intentions.

10. Respectfully, the Court's decision raises more questions than it provides answers to trustees, their counsel, and the courts which will be called upon to review trustees' exercises of discretion. One result that is near certain is that despite the legislature's intention that trust decantings be liberally available to allow trustees to adjust the provisions of irrevocable trust

agreements to reflect changed circumstances, no trustee will ever consider eliminating or modifying a non-vested beneficiary's interests by decanting, regardless of how necessary that action may be to achieve the trust's purposes, knowing that litigation will likely ensue. Such a result is not (i) conducive to the orderly administration of trusts in New Hampshire, (ii) consistent with the legislature's objective to grant broad statutory decanting authority to New Hampshire trustees and encourage settlors to establish trusts here, or (iii) consistent with the requirement that trust language be interpreted in a manner that gives maximum effect to the settlor's intent, considered to be the bedrock principle of trust law in this state. For all of these reasons, the Court, either with the original three-justice panel or acting with a full bench, should reconsider its decision before it becomes permanent.

Respectfully submitted,

Alan Johnson and William Saturley,

By their attorneys,

UPTON & HATFIELD, LLP

Date: January 11, 2018

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Joseph McDonald,

By his Attorneys,

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I hereby certify that a copy of the foregoing has this day been forwarded to Roy W. Tilsley, Jr., Esq. and Edward J. Sackman, Esq.

Russell F. Hilliard

Q I take it you had occasion to discuss these issues with David, Sr., as well during this period of time?

A I did.

Q And what were his concerns?

A His concerns were that it set a bad example. His concerns were that it was an impediment to a smooth management of the company, and that it offended him. It -- this was a significant amount of money to pay someone for a not very often show up job.

Q And we know from the testimony that from late 2009 until the first set of decantings occurred in October, 2010, that you had a series of discussions and meetings with Attorney McDonald, Mr. Johnson, David, Sr.?

A Yes.

Q And apparently, on one occasion, one of your partners, John Sullivan?

A Yeah. I think that actually came later, but yes, there were a lot of meetings, a lot of reading, a lot of discussions, again, on three levels; what's the law, what's the particular document provide, and what's going on at -- in the business.

Q And what did you do to satisfy your own judgment by each of those levels?

A First, relied on Mr. McDonald to help me understand the law. I asked him for some reading material on the law of decanting, so that I could understand it better. I read the

Uniform Trust Code, or at least portions of it, and did that. So I did research that familiarize me with something that, up until then, had been completely foreign. So --

Q I don't mean to -- I'll just ask the question. You're a graduate of Dartmouth College?

A Yes, sir.

Q And Harvard Law School?

A Yes, sir.

Q All right. So you did, in addition to relying on the expert advice of Attorney McDonald, read legal literature and materials to familiarize yourself with this concept in process?

A Yes, some of which he identified for me and some of which I identified for myself. After that, after I had some -- and I talked with him. I mean I just asked him over and over again how does this really work, because it was, again, foreign to me.

Q Well, I think you said that our generation left law school with a certain concept of irrevocable trust, right?

A Yes. Yes.

Q And you came to learn that that had changed?

A That has changed.

Q All right.

A That's now my understanding, that that has changed significantly.

Q And did you become comfortable in your own independent

judgment, in terms of the procedural issues or steps involved in decanting?

A I did.

Q And that both New Hampshire statutory law and the trust documents authorized permitted this?

A Yes. First, I understood -- wanted to understand the general law, then I wanted to understand the document itself. So I read the document, obviously, and I had Mr. McDonald walk me through it.

Q More than once?

A More than.

Q And went to John Sullivan?

A Again, that came later.

Q Oh, that came later?

A That was the second generation that I wanted to do for -- to make sure that my first understanding --

Q Uh-huh.

A -- that I had arrived at the right conclusions. I wanted somebody else to basically check my work.

Q Yeah.

A So I asked him to come up and go through the process with me all over again.

Q Okay. Judge Cassavechia may not know John Sullivan. He's a member of your firm?

A He's a member of my firm. He's the managing partner of

the Preti Flaherty Law Firm.

Q And he's been practicing for how long? Do you know?

A He's a year or two younger than I am, so probably 32 or -3 years.

Q His concentration is in real estate?

A I would identify his concentration as corporate work --

Q Okay.

A -- rather than real estate.

Q Okay. At that time -- and this is -- I mean in this period of time, from late '09 until the first decantings occurred in October, 2010, what was your understanding of Patricia's connection either to the business or to her stepfather?

A My understanding was that she was estranged from her stepfather and that she had no connection whatsoever to the operation of Hodges Development Corporation. I understood that her husband was employed at one of the facilities in Lebanon, New Hampshire.

Q All right. And how did you come to those understandings?

A Through discussion with Mr. Hodges and with discussion with some of his children and with Mr. Johnson.

Q All right. And, in fact, I think you indicated in your testimony earlier this morning that the first time you'd ever met her was when she appeared for her deposition in this case?

A That is correct.

Q All right. Just one more thing about the first set of decantings. You responded to Judge Cassavechia, indicating that you relied, in terms of the process and the underlying statutory and document authority, on Attorney McDonald?

A Yes.

Q And that you made your own independent judgment about proceeding with your participation in the decantings?

A Yes.

Q And just tell us what your thinking was and what brought you to that decision?

A The -- I would say that the context of my decision comes from my understanding of the purpose of the trust. The trust holds 98 percent of the equity of this significant enterprise. It doesn't hold cash. It's not a -- you know, it's not set up to distribute cash to people, you know, for birthdays and things like that. It is set up to run a business. And you know, if you -- what I came to realize was if you flip through the trust, which is 40 pages long, the largest section of the trust is devoted to the provisions relating to closely held business interests. It's the largest section, because that was the focus of what Mr. Hodges wanted to do and what he had in mind. And that's what the trust calls for. It calls for perpetuating this business, and so they would be successful for the community and for the employees and

for those descendants who wanted to have a role in it.

Q And what was your understanding of the nature of the children's beneficial interest in the trust?

A I understood that they were contingent beneficiaries. And contingent to me means that there's a condition, that there's an if/then. And as we went along, as the situation evolved from when I first became trustee until now, I determined, at some point, that the conditions, as I understood them, had not been satisfied.

Q And what do you mean by that, Attorney Saturley?

A If the trust is to perpetuate this business, if the trust is set up to keep this entity going, to continue to grow and to continue to provide these opportunities, then the people who should be participating in that should be decent people, polite people. If they don't have anything to do with the business -- or if they have to do with the business, then they should be of such an approach and such a quality and capacity that it helps the business as opposed to tears it apart. And one of the things that Dave Hodges used to say all the time --

Q Senior.

A -- Senior -- was he used to -- he was both fascinated and repelled by the Tamposi case. And he said over and over again, "I don't want this to end up in a Tamposi situation." He said that over and over again.

Q To you?

A To me. One of the significant sections of this trust is in 7 -- article 7 and section D, which is on trustee guidance.

Q Hold on just a minute, so we can all --

A Yeah.

Q What page of the trust is that, Attorney Saturley?

A Page 11 of this particular trust.

Q Page 11 is part of article 7 you said?

A Yes, article 7D, and I'm looking at subsection 2.

Q So D-2 --

A Yes.

Q -- of article 7, on page 11 of Exhibit --

A Yes.

Q -- 1?

A Yes.

Q Okay. And what are you focused on there, sir?

A And I'm just focused on the first sentence, because that's -- that is in writing, the thing that he said to me the very first time we talked about my becoming a trustee, and practically the last satisfying conversation I had with him before his last illness, was that he did not want what I'll call trust babies. He had a respect for people who made their own way. And so, he didn't want the trust to be used in a manner that might undermine the beneficiary self-sufficiency, productivity, and work ethic.

Q And those last few words are quoted directly from the document?

A That's -- yes, I'm quoting from the document. And that's how he expressed it to me. And that's what I read. And so, that's how I approached my role as a trustee.

Q And when did you have your last substantive conversation with Senior?

A Probably ten days before his death.

Q Okay. Let me move ahead to 2012, Attorney Saturley. Did you become aware, in the spring of 2012, about the events we all already heard about today --

A I did.

Q -- yesterday and today?

A Yes, I was familiar with them.

Q And just in summary fashion, what did you come to understand about them?

A I came to understand that David Hodges, Jr. was significantly disappointed, I guess, that he was not to be named immediately as president, but that he was to be deferred until after Mr. Johnson's tenure as president. And as he called it, and said it to me at the time, this is a game changer. And in my opinion, that's correct. I agreed, it was a game changer, because his behavior changed.

Q And you said that he said that to you. So did you have some contact with David Hodges, Jr., in the spring of '12?

A I had a telephone call with him after these events. I had contact with him before that, discussions and conversations on other topics, but --

Q Let me ask you about that telephone call. I asked Mr. Hodges, Jr., about it this morning. What do you recall about the -- first, you made the call?

A Yes.

Q Why?

A Because I wanted to see if I could perform a similar role to the one that I had performed in 2009.

Q All right.

A Albeit, that hadn't been successful, but --

Q I was just going to say that hadn't been successful, but --

A That hadn't been successful, but --

Q Okay.

A -- you know, it's --

Q But you still wanted to try?

A I wanted to try.

Q And what did you do? You called him?

A I called him.

Q Yeah. And what do you recall about the conversation?

A I believe that that's the time when he used the words to me that this was a game changer and then promptly, you know -- the conversation was very short, because he did ask in

what capacity I was calling, as a friend or as Dave Hodges' lawyer. And at that point, I said to myself if that is the direction and tenor that this conversation is going to take, I don't think it's going to be fruitful.

Q All right. And did you have any further contact with him?

A I did not.

Q Even up until today? I mean direct interaction.

A Like that?

Q Yeah.

A Telephone conversations or something, no, I have not.

Q And what about the events in the fall of 2012 that we heard testimony about from Mr. Sanborn and Senior's deposition? Did you become aware of those events?

A I did.

Q And what was your understanding of what had occurred? And first, before you answer that question, what sources of information did you have about those events?

A There was -- Mr. Hodges told me some of it. Some of the people at the office told me some of it. Some of the family members told me some of it.

Q And what was your understanding of what had happened?

A That on -- Mr. Hodges was deposed over two days, Mr. Hodges, Sr. And on the first day -- I think we went to this yesterday -- there was -- he'd been counseled to not

necessarily give his personal address at that point. He had moved out of the family home, because he felt threatened. And so the advice to him was not necessarily to give up his personal -- new personal residence at the beginning of the deposition when asked. And then finally, he gave it up anyway. And so there was -- I don't remember the exact sequence, but at some point, there were messages that Barry Sanborn now knew his address anyway. So --

Q Okay. And what about what happened after the second day?

A At some point, I understand that -- our belief was that Mr. Sanborn was -- he was attempting to intimidate Mr. Sanborn -- excuse me -- Mr. Hodges, Sr., and at some point, he had a heart attack.

Q He, Barry Sanborn?

A Barry Sanborn.

Q All right.

A It happened to be -- again, not -- I don't recall the exact sequence, but the board of directors had decided that the failure to show up and the obvious antagonism, that he could no longer be maintained as a employee, and he was going to be fired.

Q And I think, as we've already heard, the -- let me just call it the end of the employment of both David Hodges, Jr., and Barry Sanborn led to litigation against Hodges Development

Corporation?

A That is correct.

Q All right.

A Yes.

Q So move -- let's move ahead. That -- the 2012 decantings took place in December, 2012, I believe anyway?

A I think the --

Q Is my memory right?

A I think the -- 2012, I think, in July, I believe.

Q Oh, I'm sorry. That's right. I've got it reversed with 2000 --

A Right.

Q -- in July.

A Right.

Q So tell me how the process evolved on the 2012 decantings?

A By July, we'd had the event with Dave Hodges, Jr., and the game changer, and it led to the behavior that we've heard. I mean no discussion, no -- open antagonism. There are also -- at that -- by that point, it had become obvious that there was going to be a divorce. Again, I don't recall exactly when the papers were served, but it was quite clear that the three children had aligned with their mother. So at that point the discussion began. And again, it might've been me who initiated it.

Q I was going to ask you. Do you recall initiating it?

A I don't -- I just recall the discussions. I don't really recall who initiated them. But having been through this process once, it might well have been me, to say, well, is this a game changer with regards to the contingent beneficiary interest; is this a person that we believe is going to contribute to the continuity and growth of the company when management of it is handed over to somebody else, meaning the business committee, or is this somebody who, conceivably, is going to be an impediment or disruptive and interfere with that goal and that end result.

Q And that thought process -- well, excuse me. I'll ask you this way. Did that thought process lead you to make a judgment that the 2012 decanting ought to go forward?

A The 2012 decantings are result of that thought process.

Q All right.

A Four people were involved in that process. Mr. Johnson and I, you know, had to make our own separate independent judgments on that, whether or not to allow it to proceed, because we were participants in odd ways --

Q Uh-huh.

A -- as we've been through, in the mechanics. But in determining -- in making that decision and in making that determination, we called on our own judgment. We asked -- you know, we talked to each other about it. We used our own

observations. And part of the information we relied on was to talk to Mr. Hodges, Sr., about it. We wanted his opinion.

MR. HILLIARD: For the record, Your Honor, Defendants' Exhibit C is the court index of the divorce proceeding, and it reflects that the petition was filed June 21, '2012.

THE COURT: Thank you.

BY MR. HILLIARD:

Q I think you've already discussed, in response to Attorney Tilsley's questions, the 2013 decantings. And you believe you may well have been the initiator on that?

A I can certainly -- I do remember the first time it occurred to me that it might be appropriate time for another decanting. I can remember that very vividly. After that, I remember discussions, but I don't remember the exact sequence. I know where I was and I know what I was doing. So that's why I believe that I was the one who initiated it.

Q You were questioned by Attorney Tilsley about some discrepancies or lack of lining up of some of the acknowledgments on the 2012 and 2013 decanting instruments. Do you recall that?

A I do.

Q Was this process agreed upon --

A Yes.

Q -- among the --